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No. 99-269

# In the Supreme Court of the United States

STATE OF NEW YORK, ET AL., PETITIONERS

*v.*

SENECA NATION OF INDIANS, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether, in a suit originally brought against a State by an Indian Tribe, the Eleventh Amendment precludes the Tribe's continued participation as a party after the United States has intervened as a plaintiff.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 178 F.3d 95. An opinion of the district court in the Cuba Lake case (Pet. App. 9a-44a) is reported at 26 F. Supp.2d 555. An order of the district court in the Grand Island case (Pet. App. 57a-60a) adopting the magistrate judge's report and recommendation (Pet. App. 45a-56a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on May 17, 1999. The petition for a writ of certiorari was filed on August 16, 1999 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

This case arises from two consolidated actions (the Cuba Lake and Grand Island cases) to enforce the restrictions of the Trade and Intercourse Act, 25 U.S.C. 177, which prohibits and renders void any purchase or other acquisition of land from an Indian Tribe without the approval of the United States. See *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 232 (1985). The suits were filed in 1985 and 1993, respectively. Respondent Seneca Nation (Nation) filed both the Cuba Lake and Grand Island suits, asserting that the State of New York had acquired tribal land without the requisite congressional approval, rendering the transactions void. Respondent Tonawanda Band of Indians (Band) intervened in the Grand Island case. In 1998 the United States was granted leave to intervene in both cases in support of the Nation and the Band (collectively, the Tribes).

Despite the intervention of the United States, petitioners asserted that the Eleventh Amendment bars the Tribes from continuing to participate as parties. The district courts in both cases rejected that contention. Pet. App. 20a-23a, 51a-53a, 59a. Petitioners filed interlocutory appeals of those orders, and the court of appeals affirmed. *Id.* at 1a-5a.

1. a. The Nation filed the Cuba Lake suit in 1985. The complaint alleged that the State had violated the Trade and Intercourse Act by acquiring (through its power of eminent domain) approximately 50 acres of land (subject lands) reserved to the Nation by the United States. Pet. App. 13a. Although the suit was filed in 1985, the parties did not file cross-motions for summary judgment until August 1994. See *id.* at 12a. The proceedings were stayed in 1996, prior to a

decision on the summary judgment motions, pending this Court's resolution of *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997). Pet. App. 12a. In July 1997, the district court issued a supplemental briefing schedule for summary judgment motions. *Ibid.* In August 1997, the United States filed a motion to intervene on behalf of the Nation and a motion for summary judgment. *Ibid.* The district court granted the United States' motion to intervene in January 1998. *Ibid.*

The district court subsequently issued an order granting the plaintiffs' motion for summary judgment on liability and denying the defendants' cross-motion for summary judgment. Pet. App. 9a-44a. The court first held that the Eleventh Amendment does not bar the Nation's continued participation in the suit. *Id.* at 20a-23a. It explained that the Eleventh Amendment does not apply to suits by the United States. *Id.* at 20a-21a. In light of the intervention by the United States, the court determined, the Nation's continued participation "does not further compromise the State's sovereign immunity." *Id.* at 23a. The court further held that the State's acquisition of the subject lands violated the Trade and Intercourse Act. *Id.* at 40a. The damages phase of the case continues in the district court.

b. The Grand Island suit was filed by the Nation in August 1993. The Nation alleged that more than 18,000 acres of land purchased by the State in 1815 were acquired in violation of the Trade and Intercourse Act. The Band intervened in the suit as a plaintiff. Pet. 6-7.

In August 1996, the State moved to dismiss the Tribes' claims based on the Eleventh Amendment. Pet. App. 46a. The following month, the magistrate judge stayed the proceedings pending this Court's decision in *Coeur d'Alene*. *Id.* at 46a-47a. Following the decision in *Coeur d'Alene*, the Tribes sought and were granted

leave to amend their complaints. *Id.* at 47a. The State subsequently refiled its motion to dismiss the Tribes' complaints on Eleventh Amendment grounds. *Ibid.*

The United States sought leave to intervene in March 1998. Pet. App. 47a. The court granted that motion the following month. *Ibid.* In May 1998, the defendants moved to dismiss the United States' complaint on the ground that the statute of limitations in 28 U.S.C. 2415 precluded the action. Pet. App. 47a-49a. Although Section 2415 does not apply to "an action to establish the title to, or right of possession of, real or personal property," 28 U.S.C. 2415(c), the defendants argued that because the United States did not expressly seek ejectment or a declaratory judgment in its prayer for relief, the action was solely a claim for damages and was therefore barred by the limitations period (six years plus 90 days) set forth in Section 2415(b). Pet. App. 49a.

The district court adopted the recommendation of the magistrate judge (Pet. App. 45a-54a) and denied the defendants' motion to dismiss. The court rejected the defendants' argument that the statute of limitations provided a complete defense against the United States' claims,[1] and it denied the State's motion to dismiss the Tribes' complaints based on the Eleventh Amendment. See *id.* at 58a-59a. The court did, however, "require the United States to file an amended complaint-in-intervention which clearly states the relief being sought * * * in this action." *Id.* at 59a. The United States subsequently filed an amended complaint seeking a declaration that the Tribes have a right to possession of

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[1] The court referred to the magistrate judge the question whether "the statute of limitations * * * bars or limits the recovery of money damages by the United States." Pet. App. 59a.

the subject lands; damages; ejectment against the State; and all other remedies that are just and proper. See United States' First Amended Complaint in Intervention, *Seneca Nation* v. *New York*, No. 93-CV-0688A (W.D.N.Y. Dec. 18, 1998). The liability phase of the case continues in the district court.

2. The State filed interlocutory appeals from both district court orders. The court of appeals consolidated the appeals and "affirm[ed] the orders of the district court denying the State of New York's Eleventh Amendment defenses." Pet. App. 4a-5a. The court "note[d] that the State of New York retains its Eleventh Amendment immunity to the extent that the [Tribes] raise claims or issues that are not identical to those raised by the United States." *Id.* at 5a (citing *Arizona* v. *California*, 460 U.S. 605, 614 (1983)).

**ARGUMENT**

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. The Eleventh Amendment does not bar the United States from bringing an action in federal court against a State. See, *e.g.*, *Seminole Tribe* v. *Florida*, 517 U.S. 44, 71 n.14, (1996); *United States* v. *Mississippi*, 380 U.S. 128, 140 (1965). It is also clear that the United States may bring an action to protect the property interests of federally recognized Indian Tribes and their members. See, *e.g.*, *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 783 (1991) (discussing *United States* v. *Minnesota*, 270 U.S. 181, 195 (1926)). The petition for a writ of certiorari does not contest the United States' right to intervene in these cases or otherwise call into question the government's authority

to pursue the litigation. Rather, petitioners contend that the Tribes' continued participation in these actions violates the Eleventh Amendment.

As the court of appeals recognized (Pet. App. 5a), petitioners' Eleventh Amendment argument is foreclosed by this Court's decision in *Arizona* v. *California*, 460 U.S. 605 (1983). That case involved an original action to determine the respective water rights of Arizona, California, and Nevada in the lower basin of the Colorado River. The United States intervened in the suit to assert water rights for federally reserved lands, including Indian reservations, that are dependent on the Colorado River for their water. *Id.* at 608-609. The Special Master granted five Tribes leave to intervene and subsequently found that the Tribes were entitled to additional water rights. *Id.* at 612-613. The States filed objections to the Special Master's report, including an objection that "the Tribes' participation violates the Eleventh Amendment." *Id.* at 614.

This Court rejected the States' Eleventh Amendment argument. The Court "[a]ssum[ed], *arguendo*, that a State may interpose its immunity to bar a suit brought against it by an Indian tribe." *Arizona* v. *California*, 460 U.S. at 614.[2] The Court held, however, that in light of the United States' participation in the suit, "the States involved no longer may assert that [Eleventh Amendment] immunity with respect to the subject matter of this action." *Ibid.* The Court explained:

> The Tribes do not seek to bring new claims or issues against the States, but only ask leave to participate

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[2] The Court has since held that the States retain their Eleventh Amendment immunity in suits brought by Indian Tribes. *Blatchford*, 501 U.S. at 779-782.

> in an adjudication of their vital water rights that was commenced by the United States. Therefore, our judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised.

*Ibid.*

The rationale of *Arizona* v. *California* is equally applicable to cases, such as these land claims, in which the United States has intervened in an action initially brought by Tribes. See Pet. App. 22a, 53a. The court of appeals' decision in this case is correct and is consistent with the ruling of the only other court of appeals that has addressed the question. See *Mille Lacs Band of Chippewa Indians* v. *Minnesota*, 124 F.3d 904, 912-913 (8th Cir. 1997), aff'd on other grounds, 526 U.S. 172 (1999)[3]; Pet. 10 n.2.[4]

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[3] The State of Minnesota did not seek review in this Court of the Eighth Circuit's Eleventh Amendment ruling. See 98-1337 Pet. at i, *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, *supra*.

[4] Petitioners suggest that the rule announced in *Arizona* v. *California* should be limited to original jurisdiction cases, on the ground that the Court's decision in that case was "premised on its longstanding practice, apparently undertaken without analysis of the Eleventh Amendment immunity issues involved, of allowing private parties to intervene in original proceedings before the Court." Pet. 20. That argument is without merit. The Court in *Arizona* v. *California* expressly considered and rejected the States' Eleventh Amendment objection to the Tribes' intervention. 460 U.S. at 614. The Court explained that its "judicial power over the controversy is not enlarged by granting leave to intervene, and the States' sovereign immunity protected by the Eleventh Amendment is not compromised." *Ibid.* Nothing in the Court's analysis suggests that the propriety of the Tribes' request to intervene depended on the fact that the case fell within this Court's original

2. Petitioners contend (Pet. 14-16) that the decision of the court of appeals is inconsistent with this Court's rulings in *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89 (1984), and *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985). That contention is without merit.

The private plaintiffs in *Pennhurst* asserted state-law claims for injunctive and monetary relief against state officials. The United States was also a plaintiff in the case. 465 U.S. at 92.[5] The Court rejected the private plaintiffs' contention that "the presence of the United States as a plaintiff * * * remove[d] the Eleventh Amendment from consideration." *Id.* at 103 n.12. The Court explained that

> the United States' presence in the case for any purpose does not eliminate the State's immunity for all purposes. For example, the fact that the federal court could award injunctive relief to the United States on federal constitutional claims would not mean that the court could order the State to pay damages to other plaintiffs. In any case, we think it clear that the United States does not have standing to assert the state-law claims of third parties. For these reasons, the applicability of the Eleventh Amendment to respondents' state-law claim is

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jurisdiction, and nothing in Article III or the Eleventh Amendment supports such a distinction.

[5] Although this Court's opinion in *Pennhurst* does not describe the claims of the United States, the initial court of appeals opinion in the case indicates that the government's complaint was limited to federal-law claims for injunctive relief. See *Halderman* v. *Pennhurst State Sch. & Hosp.*, 612 F.2d 84, 89, 90-92 (3d Cir. 1979), rev'd, 451 U.S. 1 (1981).

unaffected by the United States' participation in the case.

*Ibid.*

Thus, *Pennhurst* simply makes clear that the presence of the United States as a plaintiff does not affect a State's Eleventh Amendment immunity from private claims *different from* those pursued by the United States itself. Consistent with that principle, the court of appeals in the instant case observed that "the State of New York retains its Eleventh Amendment immunity to the extent that the [Tribes] raise claims or issues that are not identical to those raised by the United States." Pet. App. 5a. But nothing in *Pennhurst* suggests that the Eleventh Amendment bars the Tribes' continued participation as parties with respect to the precise claims advanced by the federal government.

*Oneida* is even more clearly inapposite. In that case, counties named as defendants in a tribal land suit filed a third-party complaint for indemnification against the State of New York. This Court held that the third-party complaint was barred by the Eleventh Amendment. 470 U.S. at 251. The United States was not a party to the case, however, and the Court therefore had no occasion to consider the application of the Eleventh Amendment to suits in which private parties assert claims identical to those advanced by the federal government.

3. Petitioners contend (Pet. 19) that the principle announced in *Arizona* v. *California* is inapplicable here because the United States intervened in the Cuba Lake and Grand Island cases some years after they were commenced. Petitioners assert that "the litigation remains at the instance and under the control of the tribal plaintiffs who commenced it" (Pet. 19); that the

Tribes "continue to direct the litigation despite the belated intervention of the United States" (Pet. 21); and that "the [Tribes], if they are allowed to continue as parties, will have a substantial and likely dispositive say in the conduct of the litigation against New York, in contravention of New York's sovereign immunity under the Eleventh Amendment" (*ibid.*). Those assertions are without basis.

Because the State retains its immunity with respect to tribal "claims or issues that are not identical to those made by the United States" (Pet. App. 5a), the United States will control the future conduct of this litigation. The Tribes' right to assert the prerogatives of parties (*e.g.*, submitting interrogatories, calling witnesses, etc.) may complicate the litigation to some degree, but the Tribes' participation does not alter the suit's fundamental character as one by the United States, and it does not "enlarge[]" the federal courts' "judicial power over the controversy." *Arizona* v. *California*, 460 U.S. at 614.[6]

The rule that States have no Eleventh Amendment immunity against the United States presupposes that federal officials in their conduct of litigation against

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[6] Taken to its logical conclusion, petitioners' argument could suggest that non-federal parties may not appear even as amici curiae in suits by the United States against a State, since the process of responding to arguments made by an amicus curiae will complicate the litigation to some degree. If (as we assume) petitioners' theory does not sweep so broadly, the practical effect of their position would be to constitutionalize the distinctions made in federal rules and practice between the prerogatives of parties and those of amici. In our view, so long as the Tribes do not seek to bring before the court claims or issues not raised by the United States, the precise nature of their participation raises no issue of constitutional dimension.

state defendants will faithfully seek to pursue the national interest. Here the United States intervened to further the national interest in protecting tribal lands and treaty rights that are alleged to have been taken in violation of federal law. Petitioners' argument appears to rest on the implicit premise that the federal officials charged with conducting this litigation have failed and/or will fail to exercise independent judgment with regard to the claims and issues to be presented to the courts below. Petitioners make no effort to defend that proposition, however, which is wholly unsupported either by the United States' conduct of this litigation or by the government's approach to Indian cases generally. This Court "generally accord[s] Government records and official conduct a presumption of legitimacy," *United States Dep't of State* v. *Ray*, 502 U.S. 164, 179 (1991), and petitioners have identified no basis for departing from that presumption here.

In addition, petitioners have wholly failed to explain how reversal of the court of appeals' ruling would alleviate the problem that they believe exists. Although petitioners characterize the government's intervention as "belated" (Pet. 21), they do not seek dismissal of the United States' claims. If petitioners were correct in believing that the federal officials responsible for conducting this litigation had placed themselves under the direction of the Tribes, exclusion of the Tribes as additional parties would not reduce the Tribes' effective control over the government's litigation decisions.

4. As the tribal respondents explain (Br. 9-11), the sequence of events that culminated in the United States' intervention in these cases was largely the result of prior uncertainty regarding the ability of Indian Tribes to pursue land claims against unconsent-

ing States. This Court's decisions in *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997); *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996); and *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775 (1991), have substantially dispelled that uncertainty. The fact pattern presented here is therefore unlikely to recur with any frequency.[7]

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[7] Contrary to the suggestion of the amici States (Br. 7-9), there is no reason to hold the petition in this case pending this Court's decision in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, No. 98-1828 (to be argued Nov. 29, 1999). The question in that case is whether the United States' *failure* to take over the conduct of a *qui tam* suit against a state agency requires that the suit be dismissed on the basis of the Eleventh Amendment. Here, by contrast, the United States *has* intervened to prosecute the suit, and the State retains its immunity from any claims different from those advanced by the government.

The amici States' account (see Br. 6) of the government's filing in *Robinson* v. *Kansas*, No. 99-1193-JTM (D. Kan.), is significantly misleading. Pursuant to 28 U.S.C. 2403(a), the United States intervened in that case to defend the constitutionality of the abrogation of state sovereign immunity under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794. The government did not contend that its intervention transformed the suit into one brought by the United States. Rather, we argued that the statutory provisions authorizing private suits against state defendants are a permissible exercise of Congress's power under Section 5 of the Fourteenth Amendment. See United States' Memorandum in Support of Intervention and in Opposition to Defendants' Motion to Dismiss Concerning the Constitutionality of Title VI and Section 504, at 3, *Robinson* v. *Kansas*, *supra* (filed Sept. 15, 1999). Nothing in our filing in that case suggests that "the States' immunity to private suits will be overcome whenever the United States lends its name to otherwise private litigation" (Amici Br. 6).

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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